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IN THE

Supreme Court of the United States

October Term, 1953.

No. 256.

D. C. A. Civ. No. 18990.

TRUMAN ELVY DENNY and DELMER ELVY DENNY,
Plaintiffs and Appellants,
vs.
D. D. WATSON, Real Estate Commissioner of the State of California; and DEPARTMENT OF INVESTMENT OF THE STATE OF CALIFORNIA, DIVISION OF REAL ESTATE,
Defendants and Appellees.

Appellee's Statement Opposing Jurisdiction, Including Motion to Extend Time and Motion to Dismiss Appeal or Affirm the Judgment.

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D. D. WATSON, Real Estate Commissioner of the State of California; and DEPARTMENT OF INVESTMENT OF THE STATE OF CALIFORNIA, DIVISION OF REAL ESTATE,
Defendants and Appellees.

Appellee's Statement Opposing Jurisdiction, Including Motion to Extend Time and Motion to Dismiss Appeal or Affirm the Judgment.

Appellee respectfully presents the following matters making against the jurisdiction of this Honorable Court asserted by appellant.

Statement of the Case.

The appellants, who were licensed real estate brokers, suffered a final civil judgment to be entered against them for fraud arising out of a real estate transaction. Thereafter charges against them were filed with the Real

Estate Commissioner seeking to revoke their licenses because of the judgment, for their dishonest conduct, and their bad reputation for truth and honesty, pursuant to Sections 10176(i), 10177(f) and 10177.5 of the Business and Professions Code. Sectional references will be to that code unless otherwise indicated. After a hearing at which the complaint and judgment were introduced into evidence, and at which the appellants each testified, the Commissioner found them guilty of the charges and ordered their licenses revoked. On a Petition for Writ of Mandate, the Superior Court of California reviewed the administrative proceedings, and made its Findings of Fact and Conclusions of Law and Judgment affirming the validity of the revocation proceedings. That judgment was affirmed by the District Court of Appeal of California (*Denny v. Watson* (1952), 114 Cal. App. 2d 491, 250 P. 2d 692), and a hearing was denied by the Supreme Court of California.

The three provisions of the Real Estate Law involved in the case read as follows:

> "10176. The commissioner may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this State, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee within the immediately preceding three years, while a real estate licensee, in performing or attempting to perform any of the acts within the scope

of this chapter has been guilty of any of the following:

* * * * * * * *

"(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

"10177. The commissioner may suspend or revoke the license of any real estate licensee, who within three years immediately preceding has done any of the following:

* * * * * * * *

"(f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license, or for a renewal thereof."

Section 10177(f) refers to and is in *pari materia* with the following provisions:

"10150 . . . The application shall be accompanied by . . . the recommendation of two real estate owners of the county in which the applicant resides or has his place of business, certifying that the applicant is honest, truthful and of good reputation, and recommending that a real estate broker's license be granted to him.

"10152. The commissioner may require such other proof as he may deem advisable concerning the honesty, truthfulness and good reputation of any applicant for a real estate license, . . . before authorizing the issuance of a real estate license . . .

"10177.5. Whenever a final judgment is obtained in a civil action against any real estate licensee upon grounds of fraud, misrepresentation or deceit with reference to any transaction for which a license is

required under this division, the commissioner may, after hearing in accordance with the provisions of this part relating to hearings, suspend or revoke the license of such real estate licensee at any time within three years subsequent to said judgment."

Jurisdictional Question.

Appellants challenge the constitutionality of the foregoing statutes of California on two grounds:

(1) They are deprived of due process of law in that the statutes permit the revocation of real estate brokers' licenses solely because a final civil judgment for fraud arising out of a real estate transaction, has been entered against them;

(2) They are deprived of equal protection of law in that the statutes establish an unreasonable classification which discriminate against real estate brokers.

The appellee asserts that the appellants have failed to raise a substantial Federal question on the ground that the questions raised by the appellants are so unsubstantial as not to need further argument, (Rule 7, Supreme Court Rules), and on the further ground that the questions raised by the appellants, when examined with reference to the facts of the case as disclosed in the opinion of the District Court of Appeal, show that the Federal question relied upon by the appellants is devoid of any substantial foundation or merit. (*Equitable Life Assurance Society v. Brown,* 187 U. S. 308, 23 S. Ct. 123, 125.)

Statement of Facts.

On November 17, 1948, the appellants, in the course of their business as real estate brokers licensed by the State of California, by false and fraudulent misrepresentations induced Mr. and Mrs. Ernest C. Cramer to convey certain real property to the Dennys, to be held in trust. Thereafter, through a confederate, the property was sold in violation of said trust at a loss to the Cramers and a secret profit to the Dennys. On May 25, 1950, the Cramers secured a final judgment against the Dennys of $5,153.83, plus $500.00 as exemplary damages, for fraud, misrepresentation and deceit practiced by each of the Dennys in the aforesaid transaction.

On March 9, 1951, an Accusation was filed against each of the Dennys charging that they had, by reason of the foregoing facts and circumstances, violated the provisions of Sections 10176(i), 10177(f) and 10177.5 of the Real Estate Law as codified in the Business and Professions Code of the State of California. A hearing officer heard said matter on May 28, 1951. Both of the Dennys appeared, but were not represented by counsel. They both took the stand in their own defense. After the hearing the Real Estate Commissioner duly made and issued his written decision, finding they had violated said sections and revoking their licenses as real estate brokers therefor.

They filed a petition for a writ of mandate with the Superior Court of California, which granted them a

limited trial *de novo,* reviewed the entire record of the administrative proceedings of the Real Estate Commissioner, and found his action supported by the weight of the evidence and made pursuant to law. The Dennys presented an appeal to the District Court of Appeal of California contending that the aforesaid three sections violated due process of law and that Section 10177.5 denied them equal protection of the law. The District Court of Appeal affirmed the judgment. The Supreme Court of California denied a hearing on January 22, 1953.

In this connection it should be noted that Appellants' Jurisdictional Statement for the Allowance of an Appeal, page 2, lines 9 and 14, erroneously states that the decision of the Real Estate Commissioner and of the California courts was based *solely* upon the civil judgment, for the opinion of the District Court of Appeal expressly stated:

> "Indeed, there is force in the Attorney General's argument that the record of the commissioner's hearing contains sufficient admissions and testimony of the petitioners themselves to support the commissioner's order." (114 Cal. App. 2d 491, 495, 250 P. 2d 692, 694.)

It should also be noted that in the District Court of Appeal the issue as to the equal protection of the laws was not raised with respect to Sections 10176(i) and 10177(f). In this connection the Court stated:

> "Petitioners also challenge Section 10177.5 upon the constitutional ground that it denies them equal protection of the laws, in that it singles out real estate brokers and does not extend to other professions and occupations." (114 Cal. App. 2d 491, 493, 250 P. 2d 692, 693.)

ARGUMENT.

I.

Motion to Extend Time.

Comes now the appellee above named and moves the Court for an extension of the time within which the appellee may oppose the taking of jurisdiction, move to dismiss this appeal or affirm, and designate, in writing, filed with the clerk, under Rule 13, sub-paragraph 9, additional parts of the record which he thinks are material, from ten days after September 16, 1953, when the appellants' Statement of Jurisdiction was served upon him, to 20 days thereafter, to-wit, to and including October 6, 1953; said motion is made upon the following grounds:

A. Failure to Serve Appellee With Copies of the Petition for Allowance of Appeal, Assignment of Errors, Jurisdictional Statement for the Allowance of an Appeal, Order Allowing an Appeal, and Citation.

This appeal purports to be filed pursuant to Section 1257, Title 28, of the United States Code, the pertinent portion of which provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the Untied States, and the decision is in favor of its validity."

The only papers which to date have been served upon the appellee or his attorney are the following:

On March 31, 1953—Praecipe.

On September 16, 1953—Statement on Jurisdiction.

1. Neither Petition nor Jurisdictional Statement for Allowance of an Appeal Served.

Neither of the aforesaid documents have been served upon appellee or his attorney, as required by Rule 12. In addition, the purported Jurisdictional Statement for the Allowance of an Appeal does not meet the requirements of Rule 12 of the Supreme Court in that it fails to refer distinctly:

(a) To the statutory provisions believed to sustain the jurisdiction;

(b) To the statute of the state, the validity of which is involved, setting it out verbatim or appropriately summarizing its pertinent provisions.

2. Assignment of Errors Not Served.

The Statement on Jurisdiction attempts to incorporate by reference the points referred to in the Assignment of Error. Since a copy of the latter document was never served on appellee or his attorney, appellee was unable to properly oppose the appeal within the ten-day period.

The purpose of Rule 9 of the Supreme Court is to enable the Court and opposing counsel to see on what points appellants' counsel intend to ask a reversal of the judgment and to limit the discussion to those points. The

failure to serve appellee's counsel with a copy of the Assignment of Errors defeats this purpose, violates the rule and constitutes a ground for extension of time and for dismissal of the appeal on motion therefor.

Phillips & Colby Constr. Co. v. Seymour (Ill., 1876), 91 U. S. 646, 648, 23 L. Ed. 341.

3. Citation Not Served.

The Citation must be personally served upon the appellee or his attorney. No such service was ever made upon this appellee nor upon his attorney. Where there has been no such service the appeal should be dismissed on motion.

Supreme Court Rule 10, sub-paragraph 1;

Brown v. Union Bank (Fla., 1846), 4 How. 465, 466, 45 U. S. 465, 11 L. Ed. 1058;

Tripp v. Santa Rosa St. R. Co. (Cal., 1892), 144 U. S. 126, 36 L. Ed. 371, 12 S. Ct. 655.

Because of the foregoing facts, circumstances and law, appellee respectfully requests that his motion for extension of time to oppose jurisdiction, to move to dismiss the appeal and to designate additional parts of the record, be granted.

II.

Designation of Additional Parts of the Record.

It is desired that the following be added to the record on appeal requested by the appellants in the Praecipe, and that these additional parts be printed by the clerk:

1. The Clerk's Transcript of the judgment roll of the Superior Court of the State of California in and for the County of Los Angeles, including:

(a) The Return by Way of Answer;

(b) Findings of Fact and Conclusions of Law;

(c) Judgment.

2. The complete record of the administrative proceedings before the Real Estate Commissioner, including:

(a) Reporter's Transcript of oral proceedings, including Exhibits 1 to 4, inclusive, and A and B.

III.

Sections 10176(i), 10177(f) and 10177.5 of the Business and Professions Code Guarantee Due Process of Law to Licensees.

When the Real Estate Law of California was originally enacted a similar attack was made upon it as constituting an unreasonable interference with the right of every citizen to engage in a legitimate useful occupation and violative of the due process clauses. In upholding the validity of the act the Court stated that a lawful and useful occupation may be subjected to regulation in the public interest, the test being whether the regulation is for the pur-

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pose and effect of throwing reasonable safeguards in the public interest around the exercise of the right. If so, it is a proper exercise of the police power residing in the Legislature. The Court stated that the single primary purpose of the act is to require of real estate brokers and salesmen that they be "honest, truthful and of good reputation." All of its provisions, including the requirement of a license, are but incidental to this single purpose and designed to accomplish it. (*Riley v. Chambers* (1919), 181 Cal. 590, 593, 185 Pac. 855, 8 A. L. R. 418; *Haas v. Greenwald* (1925), 196 Cal. 236, 237 Pac. 38, affirmed 275 U. S. 490, 72 L. Ed. 389, 48 S. Ct. 33; on the authority of *Bratton v. Chandler* (1922), 260 U. S. 110, 67 L. Ed. 157, 43 S. Ct. 43.)

Statutory provisions analogous to Section 10177.5 have been held valid on a number of occasions by the courts. Thus the action of the Department of Motor Vehicles in revoking a driver's license without a hearing, after he was convicted of driving while intoxicated, was held to be proper under Section 73 of the Vehicle Act. (Now Vehicle Code, Secs. 304, 307.) (*People v. Rourke* (1932), 124 Cal. App. 752, 759, 13 P. 2d 898.) The Court stated:

> ". . . The revocation or suspension of the operator's license is not the imposition of an additional penalty to the judgment of conviction. It is a part and parcel thereof, and under both sections 73 and 73½ of the act, in so far as they are applicable here, constitute only that part of the legal penalty which the law inflicts as part of the judgment of conviction."

In short, the licensee had his day in court and the requirements of due process were met by the prior proceedings, which are *res judicata.*

Hawker v. New York (1897), 170 U. S. 189, 196, 42 L. Ed. 1002;

Caterpillar etc. Co. v. Intn'l Harv. Co. (1941, 3d Cir.), 120 F. 2d 82.

Also see:

Watson v. Div. of Motor Vehicles (1931), 212 Cal. 279, 298 Pac. 481.

We submit that Section 10177.5 as applied to the appellants herein in these proceedings, has not deprived them of due process of law. While this provision was not added to the Real Estate Law until 1945, it is quite apparent that it is merely an additional method of enforcing the fundamental purpose of the Act, namely, to permit only persons of good reputation to continue to operate as real estate brokers. Such a provision constitutes a reasonable exercise of the police power to obtain the desired objective of protecting the public welfare and interest.

IV.

Sections 10176(i), 10177(f) and 10177.5 of the Business and Professions Code Afford Equal Protection of the Law to Licensees.

The petitioners also make the contention that Sections 10176(i), 10177(f) and 10177.5 deprive them of the equal protection of the law under the Fourteenth Amendment to the Federal Constitution by discriminating against real estate brokers. However, it should be noted that identical provisions are applicable to business opportunity brokers (Secs. 10301(i), 10302(e), 10302.5) and to mineral, oil and gas brokers (Secs. 10561(i), 10562(f) and 10562.5).

Appellants contend that Section 10175.5 is the only licensing statute which makes the findings of a judgment in another civil action for fraud the basis for revocation of a license to practice one's profession or occupation. However, Sections 10302.5 and 10562.5 do the same for business opportunity and oil and gas brokers. Similarly, as the license of a chauffeur may be revoked for his failure to satisfy a civil judgment which has been rendered against him as a result of an automobile accident (Vehicle Code, Sec. 307), it cannot be said that Section 10177.5 is such a novelty.

The appellants apparently contend that real estate brokers have been discriminated against because similar provisions have not yet been provided for the revocation of licenses of other professional groups. However, we might well point out that much more stringent laws are

applicable against accountants, lawyers, doctors and chauffeurs. (Bus. and Prof. Code, Secs. 2382, 3100(b) and 6101-6102.) In any case, differences between the professions and business occupations have long been recognized as a valid basis for classification under the equal protection clauses.

The Real Estate Law was upheld as non-discriminatory in excepting from its provisions persons holding a duly executed power of attorney from the owner of the real property. (*Riley v. Chambers* (1919), 181 Cal. 589, 185 Pac. 855; also see *People v. Schomig* (1925), 74 Cal. App. 109, 239 Pac. 413.) And the cases have uniformly upheld the licensing of businesses, trades or professions, on conditions deemed necessary in the particular calling, as in the case of real estate brokers, in order to prevent fraud and other improper practices upon the public. (*Riley v. Chambers* (1919), 181 Cal. 589, 185 Pac. 855; *Griffith v. Conn.* (1910), 218 U. S. 563, 31 S. Ct. 132, 54 L. Ed. 1151; *Mutual Loan Co. v. Martell* (1911), 222 U. S. 225, 56 L. Ed. 175.)

Statutory provisions analogous to Section 10177.5 have been held to afford equal protection of the law to licensees. Thus the courts have sustained the validity of the license suspension provisions of the Financial Responsibility Law (Vehicle Code, Secs. 410-423.1; 13 Ops. Cal. Atty. Gen. 64). It requires the Department of Motor Vehicles to suspend a motorist's driving privilege until a final judgment resulting from a motor vehicle accident is satisfied or proof has been given of ability to respond in damages in the future. (*Watson v. M. V. D.* (1931), 212 Cal. 279, 298 Pac. 481; *Reitz v. Mealey* (1941), 314 U. S. 33, 62 S. Ct. 24, 86 L. Ed. 21.)

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In view of the foregoing facts, circumstances and law, we must conclude that Sections 10176(i), 10177(f) and 10177.5 have not, as applied against the appellants herein, in any manner deprived them of due process of law or the equal protection of the laws.

Conclusion.

The questions raised by the appellants, when examined with reference to the facts of the case as disclosed in the opinion of the District Court of Appeal, are devoid of any substantive foundation or merit and are so unsubstantial as not to need further argument. (Rule 7, Supreme Court Rules.) Appellee therefore moves for dismissal or an affirmance of the judgment, and for the foregoing reasons oppose the taking of jurisdiction in the instant case by this Honorable Court.

Dated: October 1, 1953.

Respectfully submitted,

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